IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 327.

GEORGE SCHWARTZ,
Petitioner,

AGAINST

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

(Nature of the Shipment.)

In contending that the transportation of the whiskey in bond from Hoboken to New York was a movement in foreign commerce or a movement of a foreign shipment of freight, respondent seeks to sustain the judgment below on grounds other than those relied on by the Circuit Court in making the judgment (R. 114).

We submit that the theory of a theft of merchandise moving in foreign commerce is not here tenable.

The 495 cases of whiskey had been delivered into the possession of McKesson & Robbins Inc. at Hoboken prior to the theft thereof charged in the indictment (R. 14, 18, Government's Exhibit 4). The purchase price had been paid by McKesson & Robbins Inc. to the original consignee the Manufacturers Trust Company, the freight charges had

also been paid in full and the bill of lading for the entire shipment of the 1,000 cases of whiskey had been assigned to McKesson & Robbins Inc. (R. 16, 17). When this bill of lading was turned over to the carrier at Pier 1, Hoboken, on August 3, 1942 and the whiskey delivered to and received and accepted by McKesson & Robbins' representatives, full ownership and legal possession of the whiskey were vested in that company as consignee.

The lien of the United States for the amount of the unpaid customs duties did not impair this actual and legal possession so vested in McKesson & Robbins Inc. It did not give the Government possession of the whiskey in any legal sense. Such lien merely created a restraint on the removal of the whiskey from bond while still in the possession of McKesson & Robbins Inc. until the customs duties and taxes should be paid. *Waldron* v. *Romaine,* 22 N. Y. 368; *Cartwright* v. *Wilmerding*, 24 N. Y. 521. The whiskey was entered in bond at Pier 1, Hoboken, by and in the name of McKesson & Robbins Inc. as the owner thereof. It remained under the restraining custody of this customs bond from then until the time it was stolen while being transported in McKesson & Robbins' bonded truck to McKesson & Robbins' bonded warehouse at No. 111 Eighth Avenue, New York City. Possession had already been acquired by the consignee and the subsequent transportation of the whiskey to New York was merely a movement of bonded merchandise in one bonded depository, (the truck), to another bonded depository, (the warehouse).

We respectfully urge that such a movement was in further protection of the Government's customs lien and not a movement of a foreign shipment of freight or a movement in foreign commerce for delivery to a consignee. We suggest that it was not a movement in commerce at all, certainly not a movement in foreign commerce. The foreign element in the freight shipment from Scotland would seem

to have been eliminated when the entire 1,000 cases of this whiskey were delivered, price and freight charges paid, into the ownership and possession of the new consignee, McKesson & Robbins Inc. at the place finally fixed by this consignee and the steamship carrier as the new place of delivery of the whiskey. Once the shipper in Scotland was paid the purchase price he had no further concern with any change in the place of delivery agreed upon by the carrier and this consignee. The contract of shipment could have been altered at any time to provide for a new place of delivery and the record here shows that on this 1,000 case shipment the carrier and McKesson & Robbins Inc. agreed that the place of "pick-up" and delivery was to be Pier 1, Hoboken (R. 14, 18). Any subsequent interstate or intrastate transportation was to be at the expense of McKesson & Robbins Inc. as the owner in possession of the whiskey.

We suggest that the element of possession by the consignee distinguishes this case from *United States* v. *Erie R. Co.*, 280 U. S. 98, relied on by respondent. In that case the prospective purchaser had never acquired possession of the merchandise which was being shipped to it by rail at Garfield, New Jersey, from the steamship pier at Hoboken, New Jersey, and this Court upheld a finding that such shipment was merely a part of the original shipment from abroad since the commerce was foreign commerce and the nature of the transportation was to be determined by the essential character of the commerce. In the case at bar the movement in foreign commerce ceased at the steamship pier in Hoboken when the carrier surrendered possession of the merchandise directly to the consignee, McKesson & Robbins, Inc. by making a final and complete delivery thereof.

Respondent cites *Marifian* v. *United States*, 82 F. (2d) 628, 630 (C. C. A. 8), certiorari denied, 298 U. S. 686, in arguing that the protection of the statute (Title 18,

Sec. 409, U. S. C. A.), extends even to situations where merchandise is in the possession of a consignee when stolen. We respectfully submit that the case is not authority for the proposition that a theft of a shipment after it has arrived at its destination and has there been delivered to and accepted by a consignee is a violation of this statute. The *Marifian* case is clearly distinguishable on its facts and was so distinguished and its ruling limited by the very court that decided it in the later case of *O'Kelley* v. *United States,* 116 F. (2d) 966, (C. C. A. 8). In the *Marifian* case a carload of merchandise was being shipped, freight prepaid, from Richmond, Virginia to a consignee at St. Louis, Missouri. The consignee intercepted the shipment, apparently without any prearranged agreement, at East St. Louis, Illinois, paid the price and freight charges on a portion only of the carload, and loaded this portion on consignee's truck to take it to consignee's place of business at St. Louis, Missouri, the specified designation of the entire shipment. The truck was waylaid on this interstate journey to Missouri and its contents stolen. The indictment charged a theft of merchandise moving as part of an interstate shipment of freight in violation of Title 18, Sect. 409, U. S. C. A., and the defendant's conviction on proof of the foregoing facts was affirmed by the Circuit Court.

It should be noted that there the entire shipment had never reached its destination and come into the consignee's possession by the time a portion of the shipment was stolen while moving on the separate interstate journey in the truck. That, of course, is not the situation in the case at bar, where the entire shipment of 1,000 cases of whiskey actually had been delivered to the consignee at the steamship pier in Hoboken, and the price and freight charges paid thereon before the 495 cases were stolen.

As the Circuit Court of Appeals for the Eighth Circuit stated in *O'Kelley* v. *United States,* 116 F. (2d) 966, 968:

> "The facts are clearly distinguishable. In the *Marifian* case there was a direct taking of the property while it was being transported in interstate commerce. In the instant case the property had been received and accepted at its destination. The property was then not the subject of interstate commerce."

Under the doctrine of both the *Marifian* and *O'Kelley* cases it would appear that the 495 cases of whiskey in the case at bar were not the subject of foreign commerce when they were stolen.

(The Court's Charge.)

In his instructions to the jury the trial judge stated that probably he would sentence the accomplice James Stegman on some later date and added "Is he (Stegman) more likely to tell the truth than an untruth when he is testifying before the Judge who is going to sentence him?" (R. 90).

Respondent now urges that this was merely calling to the jury's attention certain "obvious factors, of which the jury had already been apprised in the course of the trial." We respectfully submit that the record furnishes no basis for such a contention. It shows only that this witness testified on cross-examination that he had pleaded guilty on the eve of this trial, that he had not yet been sentenced and that he had made a statement to the Government two years previously (R. 54, 68, 69). There was no evidence of any understanding, arrangement or requirement for Stegman to be sentenced at some later date by the judge who presided at petitioner's trial. The trial court's discussion of this subject clearly constituted an argument as to some future event not in evidence and a reference to a supposed or conjectural state of facts of

which no proof had been offered. As such, we submit, it falls within the condemnation expressed by this court in *United States* v. *Breitling*, 20 How. 252, 255.

We respectfully suggest that such statements in the charge prompted the jury to indulge in speculation as to the credibility of the witness instead of weighing his testimony with the special care and caution required in scrutinizing the evidence of a self-confessed accomplice. As such they constituted error which was material and prejudicial to petitioner's constitutional rights since the witness James Stegman was the Government's key witness, the only one who testified to petitioner's alleged participation in the "hijacking" and theft of the whiskey. Unless the jury could have been induced to credit his testimony the petitioner could not have been convicted.

Respondent's brief comments on petitioner's failure to except to this charge of the trial judge. Such failure would not be fatal to petitioner's right to raise the point now, even if he had not, as he had, taken a general exception to all errors in the charge before sentence was imposed on him. Under the approved doctrine in criminal cases, any substantial error prejudicial to a defendant may be corrected on appeal regardless of the state of the record. *Wiborg* v. *United States*, 163 U. S. 632; *Crawford* v. *United States*, 212 U. S. 183; *Williams* v. *United States*, 66 F. (2d) 868, 869 (C. C. A. 10).

As the Circuit Court stated in the case last cited:

> "Alleged errors during the progress of the trial should be called to the trial court's attention by specific objection and exception in order that it may have the opportunity to correct the error. In the absence of such specific objection and exception, alleged trial errors ordinarily will not be reviewed

on appeal. *Addis* v. *U. S.* (C. C. A. 10) 62 F. (2d) 329. But under a well recognized exception to this general rule, the appellate courts of the United States, in criminal cases involving the life or liberty of the accused, may notice and correct serious errors in the trial of the accused, fatal to his rights although those errors were not challenged or reserved by objections, motions, exceptions or assignments of error. *Addis* v. *U. S., supra*; *Reynolds* v. *U. S.* (C. C. A. 10), 48 F. (2d) 762; *Bogileno* v. *U. S.* (C. C. A. 10), 38 F. (2d) 584; *Van Gorder* v. *U. S.* (C. C. A. 8), 21 F. (2d) 939; *Lamento* v *U. S.* (C. C. A. 8), 4 F. (2d) 901; *Ayers* v. *U. S.* (C. C. A. 8), 58 F. (2d) 607; *Wiborg* v. *U. S.*, 163 U. S. 632; 16 S. Ct. 1197, 41 L. Ed. 289; *Crawford* v. *U. S.*, 212 U. S. 183, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392."

CONCLUSION.

We respectfully submit that this Court should grant the petition for a writ of certiorari.

CHARLES D. LEWIS,
Attorney for Petitioner.

JAMES DEMPSEY,
Of Counsel.

October, 1945.